

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 3, 2007

STATE OF TENNESSEE v. BRENDA GALLARDO

Appeal from the Circuit Court for Bedford County

No. 16076 Lee Russell, Judge

No. M2007-00479-CCA-R3-CD - Filed February 7, 2008

Appellant was convicted in the Bedford County Criminal Court upon her pleas of guilty to two counts of filing a false police report. She was sentenced to concurrent terms of three years' incarceration in the Tennessee Department of Correction as a standard offender. On appeal, Appellant maintains she should have received a sentence other than total incarceration. Because it appears from the record that Appellant has an extensive criminal record involving misdemeanors, past efforts at alternative sentencing have been unsuccessful, and the record supports the trial court's determination that Appellant's potential for rehabilitation is low, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and ALAN E. GLENN, JJ., joined.

Andrew Jackson Dearing, III, Assistant Public Defender, Shelbyville, Tennessee, for the appellant, Brenda Gallardo.

Robert E. Cooper, Jr., Attorney General and Reporter; David H. Findley, Assistant Attorney General; Mike McCown, District Attorney General, and Michael D. Randles, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At the sentencing hearing, Appellant testified that in 2001 she became addicted to various medications prescribed for her to treat injuries she sustained from a fall. According to Appellant, her actions in writing a number of bad checks in the past, and her current convictions for filing false police reports stem from her addiction to prescription medications. Apparently, in an effort to obtain

more drugs, Appellant filed a false police report in which she claimed that her validly prescribed medications were stolen.

Appellant admitted missing a number of appointments with a probation officer who was tasked with preparing a presentence report in her case, but stated that since her arrest she had moved from Bedford County to Ashland City, Tennessee, and that she could not get a ride to the probation office in Tullahoma.

Appellant explained a 1989 conviction for possession of narcotics equipment by testifying that the equipment was not hers, but belonged to a person in whose car she was a passenger. Appellant thought she had no choice but to plead guilty. She explained that she failed to appear in court the previous month because she was in the hospital on her court date. She denied taking marijuana into the jail when she was arrested for failure to appear.

Appellant testified that her addiction destroyed her marriage and resulted in the loss of her friends. She stated she knew she needed help and asked that the trial court place her in an extensive treatment program.

The presentence report shows that Appellant has convictions of the misdemeanors of failure to appear in court, public intoxication, driving on a revoked or suspended license, possession of narcotics equipment and twenty-one violations of the bad check law. The presentence report also details the various explanations offered by Appellant for her failure to keep her appointments with the probation officer preparing the presentence report.

Analysis

A defendant “who is an especially *mitigated offender* or *standard offender* convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing in the absence of evidence to the contrary.” T.C.A. § 40-35-102(6) (emphasis added). In choosing among possible sentencing alternatives, the trial court should consider T.C.A. § 40-35-105(5), which states, in pertinent part, “The potential or lack of potential for the rehabilitation or treatment of a defendant should be considered in determining the sentence alternative or length of a term to be imposed.” *Id.* § 40-35-103(5); *State v. Dowdy*, 894 S.W.2d 301, 305 (Tenn. Crim. App. 1994). The trial court may consider a defendant’s untruthfulness and lack of candor as they relate to the potential for rehabilitation. *See State v. Nunley*, 22 S.W.3d 282, 289 (Tenn. Crim. App. 1999); *see also State v. Bunch*, 646 S.W.2d 158, 160-61 (Tenn. 1983); *State v. Zeolia*, 928 S.W.2d 457, 463 (Tenn. Crim. App. 1996); *State v. Williamson*, 919 S.W.2d 69, 84 (Tenn. Crim. App. 1995); *Dowdy*, 894 S.W.2d at 305-06.

As a Range I standard offender convicted of a Class D felony, Appellant is presumed to be a favorable candidate for a sentence involving an alternative to complete incarceration. However, all offenders who meet the criteria are not entitled to relief; instead, sentencing issues must be determined by the facts and circumstances of each case. *See State v. Taylor*, 744 S.W.2d 919, 922

(Tenn. Crim. App. 1987) (citing *State v. Moss*, 727 S.W.2d 229, 235 (Tenn. 1986)). Even if a defendant is presumed to be a favorable candidate for alternative sentencing under T.C.A. § 40-35-102(6), the statutory presumption of an alternative sentence may be overcome if:

- (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
- (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
- (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant. . . .

T.C.A. § 40-35-103(1)(A)-(C).

In the case herein, Appellant has a record of writing bad checks and failure to appear in court as ordered. Measures less restrictive than confinement have repeatedly proven to be ineffective in deterring Appellant's criminal behavior. Her failure to pay court costs as ordered in previous cases and multiple excuses for failing to keep appointments with the probation officer preparing her presentence report support the trial court's determination that Appellant's potential for rehabilitation is poor. While this Court does not doubt that Appellant's criminal behavior may be due in large measure to her drug addiction, the record in this appeal amply supports the trial court's decision to order that Appellant's three-year sentence be served in confinement.

Conclusion

The judgment of the trial court is affirmed.

JERRY L. SMITH, JUDGE